UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 03-76-P-S***
	)	
BENJAMIN ABRAMS,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Benjamin Abrams, charged with (i) two counts of being a prohibited person in possession of a firearm (a Smith & Wesson model 29 .44-magnum revolver bearing serial number S282010 and a Mossberg model 500A 12-gauge shotgun bearing serial number P921042) in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) and (ii) one count of knowingly having made a written false statement in connection with his attempted acquisition of the Smith & Wesson revolver, in violation of 18 U.S.C. §§ 921(a)(32), 922(a)(6) and 924(a)(2), seeks to suppress the fruits of an assertedly illegal roadside stop in Scarborough, Maine on September 17, 2002 as well as statements allegedly obtained in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), by United States Bureau of Alcohol, Tobacco and Firearms ("ATF") agents on February 6, 2003. *See generally* Superceding [sic] Indictment (Docket No. 26); Motion To Suppress Search and Its Fruits ("Motion") (Docket No. 13).[1] An evidentiary hearing was

[1] Per *Miranda*, an accused must be advised prior to custodial interrogation "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 478-79.

(*continued on next page*)

held before me on January 20, 2004 at which the defendant appeared with counsel and at the conclusion of which counsel for both the defendant and the government argued orally. I now recommend that the following findings of fact be adopted and that the Motion be denied.

I. Proposed Findings of Fact

A. Roadside Stop

Scarborough police officer Shawn Anastasoff was patrolling a sparsely populated stretch of Route 114, also known as Gorham Road, alone in his marked police cruiser at approximately 1:30 a.m. on September 17, 2002 when he passed a vehicle heading in the opposite direction. He read the vehicle's license plate number and ran a check on a laptop computer in his cruiser. The check indicated that the license plate belonged to a different vehicle than the one he had just spotted, that the registered owner's license was suspended and that there was an outstanding warrant for that individual's arrest.

Anastasoff turned around and pursued the vehicle, without blue lights or siren, catching up with it within approximately one minute. As he drew closer, he realized that he had misread the license plate number. He then observed the vehicle pull abruptly off the roadway onto the apron of a residential driveway. It came to a stop perpendicular to the top of the driveway, blocking most of it. Anastasoff was familiar with the residence, located at 330 Gorham Road, and its occupants. He did not recognize the now-parked vehicle as belonging to the residents; in fact, so far as he knew, the residents did not drive.

Anastasoff pulled his cruiser alongside and parallel to the vehicle (not blocking its egress), rolled down his passenger window and inquired whether the driver was "all set," or "okay," or words to that effect. The driver – whom the parties stipulate was Abrams – responded in slurred speech that he was

really tired, or words to that effect. Then, without any instruction or direction from Anastasoff, Abrams got out and started walking toward the rear of his vehicle. Anastasoff asked him what he was doing. Abrams yelled that he was refusing to drive the car. Anastasoff then backed his cruiser up, switched on his blue lights, got out and approached Abrams. Eventually Abrams was arrested for operating under the influence ("OUI").[2]

At no time prior to arresting Abrams had Anastasoff observed speeding, swerving or other improper operation of the vehicle Abrams had been driving. He had no reason to believe, prior to the time Abrams and he exchanged words, that Abrams was impaired. Initially, he was pulling up alongside the Abrams vehicle to check and see if everything was alright, not to accuse anyone of wrongdoing. Had Abrams driven back on the road before the two exchanged words, Anastasoff probably would have done nothing. When Anastasoff later ran a check of the correct license plate number, it revealed that the plate belonged to the car he had observed.

B. ATF Questioning

On February 6, 2003 ATF special agent Joseph F. Robitaille, Jr. and ATF trainee Michael Grasso traveled to Naples, Maine, with the object of interviewing Abrams, who was among several Naples residents under ATF investigation.

Robitaille had never before met Abrams, although he had spoken with him on the phone and had met Abrams' brother in the course of the investigation. In addition, prior to February 6, 2003 Robitaille had learned from Cumberland County Sheriff's Detective Bill Rhodes, who had been assisting from the start

[2] The parties stipulate that after Abrams was arrested for OUI, a search of the vehicle yielded the two firearms that form the basis for the instant charges against him.

with this particular ATF investigation, that Abrams had been very helpful and cooperative in past dealings with Rhodes. Robitaille also had reason to believe, prior to February 6, that Abrams was a "prohibited person" – someone who could not lawfully possess firearms – based on a review of records of a Massachusetts breaking-and-entering charge and documentation regarding the September 17, 2002 arrest and seizure of two firearms. In addition, prior to the encounter in Naples, Robitaille had verified that Abrams had filled out paperwork from a Maine gunsmithing store on March 5, 2002 to purchase one of the firearms in question and had completed the purchase on March 9, 2002.

After traveling to Naples, Robitaille and Grasso met with Cumberland County Sheriff's Deputy Brian Ackerman, who knew many of the individuals under investigation. They asked him if he knew where Abrams, a building contractor, was working that day. Ackerman, who said he had paperwork to serve on Abrams, offered to lead Robitaille and Grasso to Abrams' worksite. Robitaille suspected that the paperwork had something to do with the burglary investigation but did not know for certain. Ackerman, who was in uniform, drove his marked cruiser to an area of upgraded camps known as the Ledges, while Robitaille and Grasso, who were in plainclothes, followed in an unmarked car. Ackerman stopped at a camp alongside which was a van that Robitaille recognized as belonging to Abrams' brother. Robitaille and Grasso stood by their car while Ackerman dealt with Abrams. Then Ackerman left, and Robitaille and Grasso approached Abrams. They introduced themselves and explained their credentials. Robitaille informed Abrams that they wanted to talk to him about what had been going on in the Sebago Lake area with Leo Welch and others with whom Abrams was acquainted. Robitaille also told Abrams that he understood from Rhodes that Abrams had been very cooperative with Rhodes and would cooperate with him, and that if Abrams chose to do so, Robitaille was there to listen to his side of the story.

Abrams' brother asked him if he was all set, and there was some discussion about how Abrams would get home if his brother left. Robitaille offered to give Abrams a lift home if Abrams chose to speak with them. Abrams agreed to talk to the agents, and Abrams' brother departed. Robitaille did not recall whether he specifically told Abrams he did not have to speak with them or that he was not in custody. Robitaille and Grasso were wearing badges and guns; however, these were concealed.

Abrams invited Robitaille and Grasso into the camp in which he had been at work painting. The three men were alone in the camp. Just inside the foyer, they sat down on some large paint buckets or joint-compound cans and had what Robitaille described as a relaxed, casual conversation. Robitaille, a fifteen-year ATF veteran, did most of the questioning and took notes, while Grasso observed and made an occasional comment.

The men talked for thirty or forty minutes. Robitaille found Abrams open and forthcoming, to the point that Abrams was pouring out information faster than Robitaille could write it down on paper while sitting on a bucket. Some of what Abrams said simply confirmed Robitaille's information; however, Abrams also provided new detail concerning the Massachusetts breaking-and-entering charge and described a Colorado domestic-violence conviction. At one point, Abrams expressed concern that the line of questioning was implicating him. However, Robitaille had the impression that Abrams was willing to provide information that was damaging not only to others but also to himself.

Although Abrams had not met Robitaille prior to February 6, 2003, he had heard of him through Rhodes. Rhodes had described Robitaille as "a good guy," asking Abrams to "take care of him" and tell him what he wanted to know about Leo Welch or others. Abrams assumed, from these statements, that if he told Robitaille what he wanted to know, Rhodes would make sure that he was charged only with criminal

trespass, not with burglary. According to Abrams, there was no express agreement to this effect; it was "an unsaid thing" that was all part of a bigger picture.

The summons that Ackerman served Abrams on February 6 was a summons for criminal trespass, not for burglary. Abrams acknowledges that he voluntarily invited Grasso and Robitaille into the camp and voluntarily made statements during the February 6 interview when asked.

II. Discussion

A. Roadside Stop

The defendant seeks as an initial matter to suppress, as "fruit of the poisonous tree," all evidence obtained as a result of the September 17, 2002 roadside stop, including the two firearms seized in connection therewith and any additional evidence obtained by the government as a result of the firearm seizure. *See* Motion at 2; *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

The defendant posits that inasmuch as (i) Anastasoff's initial basis for effectuating a traffic stop had dissipated before Abrams pulled off the road, and (ii) nothing else in the manner in which the vehicle was driven justified any contact with the driver whatsoever, the stop was impermissible. *See* Motion at 2-3. The government agrees that the initial basis for the stop dissipated before Abrams pulled over but contends that Anastasoff's subsequent actions were justified by Abrams' own subsequent conduct. *See* Government's Objection to Defendant's Motion To Suppress, etc. ("Objection") (Docket No. 18) at 4-5. The government has the better of the argument.

As the First Circuit has observed:

> In *Terry v. Ohio*, [392 U.S. 1 (1968)], the Supreme Court first recognized that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable

> cause to make an arrest. This authority permits officers to stop and briefly detain a person for investigative purposes, and diligently pursue a means of investigation likely to confirm or dispel their suspicions quickly.

United States v. Trueber, 238 F.3d 79, 91-92 (1st Cir. 2001) (citations and internal punctuation omitted). The validity of an investigative *Terry* stop hinges on "whether the officer's actions were justified at their inception, and if so, whether the actions undertaken by the officers following the stop were reasonably responsive to the circumstances justifying the stop in the first place as augmented by information gleaned by the officers during the stop." *Id*. at 92 (citations and internal punctuation omitted). An "objective reasonableness standard" governs. *United States v. Moore*, 235 F.3d 700, 703 (1st Cir. 2000). The government bears the burden of demonstrating the constitutionality of warrantless seizures and searches, including purported *Terry* stops. *See, e.g., United States v. Link*, 238 F.3d 106, 109 (1st Cir. 2001).

At hearing, the parties disagreed over whether Anastasoff effectuated a "stop" when he pulled alongside Abrams (as the defendant contended) or when he finally backed up and activated his blue lights (as the government argued). In effect, counsel for the government broke the roadside stop into two phases, arguing that (i) under the circumstances Anastasoff acted properly and responsibly in inquiring whether the driver was okay, and (ii) once he made that permissible inquiry, Abrams' speech and conduct raised a reasonable suspicion of impairment, leading Anastasoff justifiably to initiate a full-fledged investigative *Terry* stop. I agree.

Anastasoff's initial brief check on the driver's status was not a classic *Terry* stop of the type that is premised on reasonable and articulable suspicion of commission of a crime, but rather represented an exercise of what has been characterized as the police's "community caretaking function":

> The policeman plays a rather special role in our society; in addition to being an enforcer of the criminal law, he is a jack-of-all-emergencies, expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety. Recognition of this multifaceted role led to the [Supreme] Court's coinage of the 'community caretaking' label in *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L.Ed.2d 706 (1973).

United States v. Rodriguez-Morales, 929 F.2d 780, 784-85 (1st Cir. 1991) (citations and internal quotation marks omitted). As the First Circuit has observed, "The imperatives of the fourth amendment are satisfied in connection with the performance of such noninvestigatory duties, including community caretaker tasks, so long as the procedure employed (and its implementation) is reasonable." *Id*. at 785.[3]

Anastasoff's conduct passes this test. Anastasoff had witnessed Abrams' car suddenly pull off the road onto the apron of a driveway parallel to the road in the dead of the night for no apparent reason. The stretch of road was sparsely inhabited and, to the best of Anastasoff's knowledge, the vehicle did not belong to the residents of 330 Gorham Road. For all the officer knew, something might have been terribly wrong. His simple act of pulling alongside the Abrams vehicle (without blocking its egress) and inquiring whether its driver was okay was entirely reasonable under the circumstances. From that point onward, as

[3] *Rodriguez-Morales* concerned the legitimacy of impoundment of a detained driver's vehicle, *see Rodriguez-Morales*, 929 F.2d at 785-86; however, the authority of police to conduct reasonable, limited checks or inquiries into the status of individuals whom they have reason to believe pose a hazard to themselves or others (including occupants of cars parked in public areas) also has been recognized, *see, e.g., United States v. Novitsky*, 58 Fed. Appx. 432, 435 (10th Cir. 2003) ("In this case, the report of a 'man down,' coupled with the discovery of two people asleep or passed out in a car, authorized the officers to check their condition. Defendant concedes the officers properly roused him and ordered him out of the vehicle."); *State v. Gulick*, 759 A.2d 1085, 1086, 1088 (Me. 2000) (officer permissibly asked driver who parked in front of closed medical-emergency facility in middle of night whether everything was okay; "safety reasons alone can be sufficient to allow the detention of a driver if they are based on specific and articulable facts") (citation and internal punctuation omitted); *see also, e.g., Gallegos v. City of Colorado Springs*, 114 F.3d 1024, 1029 n.4 (10th Cir. 1997) ("In the case at bar, Sergeant Lofgren and Officer Santos observed a distraught Mr. Gallegos on a public sidewalk in the middle of the night. Not only did he smell of alcohol, but he was crying and walking down the street with his hands over his face. In light of these facts, we believe the officers were justified in stopping Mr. Gallegos to check on his welfare."); *United States v. Rideau*, 949 F.2d 718, 720 (5th Cir. 1991), *vacated on reh'g on other grounds*, 969 F.2d 1572 (5th Cir.1992) (officers would have been derelict in duties not to have checked on condition of man found wearing dark clothing and standing in middle of road, possibly intoxicated).

the government suggests, Abrams himself laid ample groundwork for sufficient suspicion to justify an investigative *Terry* stop when he responded with slurred speech, exited his car and yelled that he was refusing to drive. Only then, with his cruiser backed up and blue lights flashing, did Anastasoff initiate a classic *Terry* stop.[4]

In sum, Anastasoff's conduct both in initially stopping to check whether Abrams was okay and then in initiating a *Terry* stop was consistent with the dictates of the Fourth Amendment. There is no "poisonous tree" whose fruits must be suppressed.

B. ATF Questioning

The defendant secondly and finally argues that regardless of whether Robitaille's February 6, 2003 interview of Abrams constitutes fruit of the poisonous tree, there is an independent basis for suppressing the statements Robitaille then elicited. *See* Motion at 3-4.

In his motion, defense counsel contends that Robitaille's questioning violated *Miranda* inasmuch as (i) the facts, in particular Robitaille's prior possession of information regarding Abrams, indicated Abrams was in custody, and (ii) most of Robitaille's remarks were reasonably likely to elicit incriminating responses. *See id*. At hearing defense counsel added a new wrinkle, arguing that Abrams' implicit understanding with Cumberland County Sheriff's Detective Rhodes undercut the voluntariness of his statements to Robitaille. Counsel for the government objected to the newly framed argument as prejudicial, representing that the government would have called Rhodes as a witness had it known before hearing that the issue would arise.

[4] Abrams cites, *inter alia*, the recent First Circuit case *United States v. Golab*, 325 F.3d 63 (1st Cir. 2003), for the proposition that Anastasoff lacked reasonable, articulable suspicion to initiate contact with Abrams after Abrams pulled off the road, *see* Defendant's Reply Memorandum (Docket No. 24) at 4-5. *Golab* is distinguishable in that law enforcement officers in that case were not checking on the defendant's welfare but rather initiating a *Terry* stop on less (*continued on next page*)

Defense counsel acknowledged the validity of the government's concern, explaining that the issue had only recently come to his attention, but stated that he wished to continue to press the point. I ruled that to the extent I found the Rhodes argument critical, I would reopen the hearing to afford the government an opportunity to call Rhodes as a witness. I now determine that the Rhodes argument is without merit, as a result of which no reopening of the hearing is necessary.

I first consider, and quickly dispose of, Abrams' argument as originally briefed. He posits, in essence, that because Robitaille already considered him a prime suspect before interviewing him, the interview was tantamount to a custodial interrogation for *Miranda* purposes. *See id*. This argument misses the mark. "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994). The obligation of an officer to administer *Miranda* warnings attaches "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Id*. at 322 (citations and internal quotation marks omitted).

The custody determination, in turn, hinges not on whether the suspect feels "free to leave" but rather on "whether there was an arrest or restraint on freedom of movement of the degree associated with a formal arrest." *United States v. Fernandez-Ventura*, 132 F.3d 844, 846 (1st Cir. 1998) (citation and internal quotation marks omitted). The suspect's subjective viewpoint is immaterial; what matters is "how a reasonable man in the suspect's position would have understood his situation." *United States v. Quinn*, 815 F.2d 153, 157 (1st Cir. 1987) (citation and internal quotation marks omitted). "Among the factors to consider" in making a *Miranda* custody determination "are whether the suspect was questioned in familiar

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than reasonable, articulable suspicion. *See Golab*, 325 F.3d at 67-68.

or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." *United States v. Nishnianidze*, 342 F.3d 6, 13 (1st Cir. 2003) (citation and internal quotation marks omitted).

By these lights, no reasonable person in Abrams' position would have understood himself to be "in custody" during the interview of February 6, 2003. No physical restraint was used on Abrams, nor was any threatened. He was interviewed by two ATF agents, one a trainee whose purpose primarily was to shadow his experienced mentor. Both agents were in plainclothes, with badges and weapons concealed. Neither insisted that Abrams talk to them. Robitaille stated that if Abrams talked to them, he would give him a lift home afterward. Abrams freely invited the two men into the camp in which he had been working and provided them with makeshift seats. He was in familiar surroundings over which he exercised control. The tone of the interview, which lasted only thirty to forty minutes, was relaxed, and when it ended Robitaille drove Abrams home as he had offered to do.

That Abrams was not "in custody" for *Miranda* purposes is dispositive of his argument as originally briefed. In the absence of a finding of custody, it is irrelevant whether Robitaille's comments were reasonably likely to elicit incriminating information (*i.e.*, amounted to "interrogation"). *See, e.g., United States v. Vega-Figueroa*, 234 F.3d 744, 749 (1st Cir. 2000) ("In order for *Miranda* rights to be invoked, there must be (1) custody and (2) interrogation.").

I turn finally to the argument raised for the first time at hearing, which defense counsel framed as implicating the issue of the voluntariness of Abrams' statements. As the First Circuit has noted, "The requirement that a confession must be voluntary in order to be admitted into evidence rests on two constitutional bases: the Fifth Amendment right against self-incrimination and the Due Process Clause of the

Fourteenth Amendment." *United States v. Faulkingham*, 295 F.3d 85, 90 (1st Cir. 2002) (citation and internal quotation marks omitted). To the extent Abrams makes a Fifth Amendment argument, he argues, in essence, that statements were elicited in the absence of required *Miranda* warnings. *See, e.g., id*. ("Faulkingham's statements were obtained in violation of the Fifth Amendment because he was not given a *Miranda* warning."); *Dickerson v. United States*, 530 U.S. 428, 435 (2000) ("[In *Miranda*, we] concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.") (citation and internal quotation marks omitted). As previously discussed, Abrams' *Miranda* claim founders inasmuch as he was not "in custody" during the ATF agents' questioning.

To the extent Abrams presses a Fourteenth Amendment voluntariness argument, the government bears the burden of showing, based on the totality of the circumstances, that investigating agents neither "broke" nor overbore his will. *Chambers v. Florida*, 309 U.S. 227, 239-40 (1940). As this language suggests, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary[.]'" *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). *See also, e.g., Rice v. Cooper*, 148 F.3d 747, 750 (7th Cir. 1998) (in context of voluntariness of confession, "[t]he relevant constitutional principles are aimed not at protecting people from themselves but at curbing abusive practices by public officers.") (citation omitted). Although promises of leniency are relevant, the First Circuit has suggested that they do not *per se* render a confession involuntary. *See, e.g., Coombs v. State of Maine*, 202 F.3d 14, 19 (1st Cir. 2000) (noting, in habeas case, that "it is less apparent to us than to the Maine Law Court that if a promise had been made it automatically would have rendered the confession involuntary"); *United States*

v. Byram, 145 F.3d 405, 408 (1st Cir. 1998) ("[I]t would be very hard to treat as *coercion* a false assurance to a suspect that he was not in danger of prosecution.") (emphasis in original).

I am satisfied that in this case the evidence as a whole indicates that Abrams' will was not overborne by coercive police activity. As an initial matter, Abrams himself testified on cross-examination that the statements he made to Robitaille on February 6, 2003 were voluntary. That this was so is corroborated by other evidence adduced at hearing, including that:

1. Abrams had previously been cooperative and forthcoming with Rhodes even in the absence of any prior *quid pro quo* agreement, suggesting that Abrams was inclined for his own reasons to cooperate with law enforcement officers. A unilateral hope of lenient treatment does not render a confession involuntary. *See, e.g., United States v. Rowley*, 975 F.2d 1357, 1361 (8th Cir. 1992) ("Although Rowley's statements were given in the hope of leniency, they were not given with the promise of leniency, and thus were not involuntary on that score.").

2. Abrams admitted that Rhodes made no express promise of leniency; rather, Abrams testified that there was an unspoken understanding.

3. Moments before Abrams spoke with Robitaille and Grasso, he was served a summons for criminal trespass rather than burglary. The timing of its service casts serious doubt on the existence of any *quid quo pro* promise or understanding on Rhodes' part. Presumably, had Rhodes subscribed to such an agreement, he would not have lowered the charge to criminal trespass until he was satisfied that Abrams had fulfilled his end of the bargain.

4. No reference was made during the February 6, 2003 interview itself to the alleged *quid pro quo* agreement with Rhodes. Nor is there evidence that any other threats or promises were made at that

time.

5. There is no evidence that Abrams was impaired, intoxicated or otherwise unable to make intelligent choices when dealing with either Rhodes or Robitaille.

In sum, I find that even on the hearing record as it now stands, the government meets its burden of proving that the statements made by Abrams on February 6, 2003 to Robitaille and Grasso were made voluntarily for purposes of the Fourteenth Amendment.

III. Conclusion

For the foregoing reasons, I recommend that the Motion be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 29th day of January, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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